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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-345

WILLIAM B. ORKIN AND
BOBBY CHARLES BOWEN,

Petitioners,

versus

THE STATE OF GEORGIA,

Respondent.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA

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The State of Georgia respectfully presents this response to show that the writ should not be granted.

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

QUESTIONS PRESENTED
(Omitted, Rule 40(3))

STATEMENT OF THE CASE

The Petitioners' statement omits the following controlling facts:

On the hearing of the Motions to Suppress the recorded conversations between Orkin and Bowen on June 20, 1974, filed on behalf of Orkin and Bowen, and commencing on August 27, 1974, Mr. Weller, Assistant District Attorney, of counsel for the State, in an opening statement summarizing the State's evidence said in connection with the intended victim, Gerald Johnson:

> "This is in the conversation on June the 20th at 11:30 A.M. After that, the victim was brought to the district attorney's office from his office and subsequently in the afternoon a court order was obtained from Judge Tidwell at approximately 6:40 P.M." (Motion Transcript, p. 23).

During this hearing, Assistant District Attorney Weller addressed the following question to witness Gene A. Matthews, a district attorney's investigator:

> "Now with respect, at that point in time, June 20th, at 11:30 A.M., after this conversation, did you and Mr. Matthews then go and see the victim, Mr. Jerry Johnson?"

After correcting the interrogator to name his associate, Matthews testified:

> "Mr. Hewatt and I went to the Equitable Building and to the Equitable Life Insurance Company and interviewed Mr. Gerald Johnson." (Motion Transcript, p. 124).

Matthews went on to testify that later on June 20, 1974, he signed an affidavit before Judge Tidwell and was present when Judge Tidwell signed a wiretap order at 6:40 P.M. on the same date (Motion Transcript, pp. 124, 125).

Later in the same hearing, during cross-examination of the same witness, Matthews, by Mr. Asinof, then and now Bowen's counsel, the following transpired:

> "Q (By Mr. Asinof) Now, were you present before Judge Tidwell on June the 20th at the time that he granted the order to seize the conversations and record the conversations of Mr. Bowen and other unknown persons?
> A (By Mr. Matthews) Was I present?
>
> Q Yes sir.
> A When he signed it?
>
> Q Yes sir.
> A Yes sir.
>
> Q And did you at that time attempt in any way to relate to Judge Tidwell any of the facts upon which you were relying as a basis for Billy Orkin's connection with the conspiracy?
> A Yes sir.
>
> Q You did? Was that under oath?
> A Yes sir.
>
> Q Did you tell Judge Tidwell under oath at that time that the—any of the items which you believe to constitute a probable cause to believe that Mr. Orkin was a conspirator?
> A Yes sir."

On the trial, Orkin testified that at some time prior to June, 1974, Mrs. Johnson told him that she had in-

formed her husband that she and Orkin were "in love"; further, that Mrs. Johnson had called him, Orkin, on one occasion in March (1974) to warn him that Johnson might be "looking for him." (Trial Transcript, pp. 1444-1447).

ARGUMENT

1. THE RECORD DOES NOT SUPPORT PETITIONERS' CLAIM OF A KNOWING AND DELIBERATE VIOLATION OF 18 U.S.C. SEC. 2518(1)(b)(iv) BY THE STATE'S REPRESENTATIVES.

The testimony of witness Matthews that he interviewed Gerald Johnson on June 20, 1974, and later under oath related to the judge who issued the wiretap order "facts upon which you were relying as a basis for Billy Orkin's connection with the conspiracy" and "items which you believe to constitute a probable cause to believe that Mr. Orkin was a conspirator" completely negates the claim that the State deceived the judge.

When the district attorney and the judge considered the matter of naming Orkin in the application and order they were necessarily influenced by the fact that he was a business man with an excellent reputation (called "sterling" in the petition). The decisions on the point involve persons who were known by reputation or by prior convictions or both to be in some way involved in or closely connected with persons involved in professional gambling. Orkin certainly had no such background as to murder. There was always the possibility that the whole thing was a personal project of Bowen's thought up by him alone from some misguided sense of loyalty, or perhaps based

on some chance remark of Orkin in his presence of the same nature as the remark of Henry II in the presence of the four knights who took it as a command to murder Archbishop Becket.

In the close factual situation, good judgment and fairness are good reasons for omitting the name of Orkin from the papers.

2. THE RECORD DOES NOT SUPPORT PETITIONERS' *BRADY* CLAIM OF PROSECUTORIAL MISCONDUCT.

Assistant District Attorney Weller's statement on the Motion hearing that after 11:30 A.M. and before a court order was obtained, on June 20, 1974, "the victim was brought to the district attorney's office from his office" and the testimony of investigator Matthews that "Mr. Hewatt and I went to the Equitable Building and to the Equitable Life Insurance Company and interviewed Mr. Gerald Johnson" on June 20, 1974, after 11:30 A.M. and before going to the judge to obtain a wiretap warrant, notified Orkin and Bowen that the State's representatives had met and talked with Gerald Johnson.

Orkin's testimony on the trial that Mrs. Johnson had, prior to June, 1974, informed him that she had told Gerald Johnson, her husband, that she and Orkin were "in love" with each other and that on the occasion in March she had called him to warn him that Johnson might be "looking for him" showed that Orkin was aware that Johnson knew of the love affair and that Johnson felt some animosity toward him because of the situation.

The trial judge was right when he overruled the extraordinary motion for a new trial wherein Petitioners claimed that the fact that Johnson told the State's agents that Mrs. Johnson and Orkin had been and were emotionally involved and that he could think of no one but Orkin who might want him killed was newly discovered; the Supreme Court of Georgia was correct in holding Johnson's testimony cumulative. Direct evidence establishing what had already been proved circumstantially can not be called new or newly discovered evidence.

Matthews' testimony that he related to the judge who signed the wiretap order, under oath, facts connecting Orkin with the conspiracy, after he had interviewed Johnson, certainly destroys any inference that anything was being hidden from anybody.

There was nothing whatever to prevent Orkin's counsel from asking Matthews what Johnson told the State's agents on June 20, 1974, on cross-examination. The reasons for failure to inquire are obvious: everyone in the courtroom knew that Matthews would answer that Johnson related his wife's involvement with Orkin and expressed no surprise that Orkin might wish him dead and that he relayed this in substance to Judge Tidwell.

Petitioners fail to point out how *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976), explaining *Brady*, apply. The fact that the State's agents had talked with Johnson before the wiretap order was applied for was apparent from Weller's statement and Matthews' testimony, both quoted. Petitioners claim that they did not know that Johnson had met with agents of the State fails.

3. THERE IS NO MERIT IN ORKIN'S CONTENTIONS REGARDING THE ADMISSION OF BOWEN'S STATEMENTS.

The statements in question, as is conceded in the petition, clearly would have been admissible under the Federal Rules of Evidence and decisions of the federal courts, had petitioners' trial been held in a federal court. Their admissibility under Georgia law was beyond doubt. Any examination into the present validity of the theory of admissibility under which the statements came in must necessarily bring in question Federal Rules of Evidence, Rule 801(d)(2)(E) and a long line of decisions by the federal courts (e.g., *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617 (1892)). Strictly speaking, the statements were not hearsay. Rule 801(d)(2)(E); 4 J. Wigmore, Evidence, Chadbourne Rev., Sec. 1079 at p. 186; 6 J. Wigmore, Evidence (3rd Ed.) Sec. 1769, at 184. However, such statements are commonly referred to as admissible under an exception to the hearsay rule. Petitioners are not taking the position that widespread injustice is resulting from the admission of statements by co-conspirators, or even injustice to them, but simply that a rule of non-admissibility might have resulted in their aquittal. (The sufficiency of the evidence to support the verdict of guilty was conceded in the direct appeal to the Supreme Court of Georgia.)

The decision of the Supreme Court of Georgia is in accord with *Dutton v. Evans*, 400 U.S. 74 (1970), with decisions of this Court prior to Dutton, and with current decisions of the lower federal courts applying the Federal Rules of Evidence.

Petitioners assume that they can now file their petition seeking review of the decision of the Supreme Court of

Georgia on the direct appeal, in which a motion for a rehearing was denied February 11, 1976 (236 Ga. 1976), as a matter of right. This appears questionable, since when the motion for a rehearing was denied, the judgment became final and subject to review under Rule 22(1). An extraordinary motion for a new trial under Georgia practice is not a further step in the same case, but a new proceeding. *Cox v. State*, 19 Ga. App. 283(2), 91 S.E. 422; *Powell v. Weeks*, 54 Ga. App. 468, 188 S.E. 263; *Federal Investment Co. v. Ewing*, 166 Ga. 246(2-5); 141 S.E. 65. Decisions such as *Reece v. State of Ga.*, 350 U.S. 85 (1955), where a new trial was granted on the direct appeal appear to be distinguishable. Since the ninety day requirement is not jurisdictional, there is no doubt that the Court can accept a petition eighteen months late, which may be what Petitioners are asking the Court to do as respects their third and fourth questions.

4. PETITIONERS' CLAIM OF GRAND JURY DISCRIMINATION IS WITHOUT MERIT.

Respondent relies on the pertinent portion of the opinion of the Supreme Court of Georgia in support of respondent's contention (*Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61, set forth *in extenso* as Appendix A to the petition; pertinent portion commences at petition, p. 10a).

CONCLUSION

Petitioners make no case for the grant of the writ.

Respectfully submitted,

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CARTER GOODE
Assistant District Attorney
Atlanta Judicial Circuit

Attorneys for Respondent
The State of Georgia

CERTIFICATE OF SERVICE

I certify that I have served the foregoing petition by depositing copies of same in the United States Mail with sufficient postage affixed to assure delivery, addressed to Petitioners' counsel:

Mr. Hugh M. Dorsey, Jr.
3300 First National Bank Tower
Atlanta, Georgia 30303

Mr. Wesley R. Asinof
New Hope Road
Fayetteville, Georgia 30214

This _____ day of _____, 1977.

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